No. 14-8358

In the Supreme Court of the United States

AVONDALE LOCKHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's prior New York conviction for first-degree sexual abuse involving an adult victim constitutes a "conviction under * * * the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," thereby triggering the ten-year mandatory minimum sentence provided in 18 U.S.C. 2252(b)(2).

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 9-24) is reported at 749 F.3d 148.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2014. A petition for rehearing was denied on October 16, 2014 (J.A. 8). The petition for a writ of certiorari was filed on January 14, 2015, and was granted on May 26, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2252(b)(2) of Title 18 of the United States Code provides:

> Whoever violates, or attempts or conspires to violate [18 U.S.C. 2252(a)(4)] shall be fined under this title or imprisoned not more than 10 years, or both,

> but * * * if such person has a prior conviction under this chapter [*i.e.*, chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. 2252(b)(2).

Other relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-33a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4). J.A. 25-26. The district court concluded that petitioner was subject to a mandatory minimum sentence of ten years of imprisonment under 18 U.S.C. 2252(b)(2), because he had a prior state-law conviction for aggravated sexual abuse. J.A. 45; see Presentence Investigation Report (PSR) ¶¶ 47-48. The court sentenced petitioner to ten years of imprisonment, to be followed by ten years of supervised release. J.A. 27-28, 50-51. The court of appeals affirmed. J.A. 9-24.

A. Statutory Background

1. Section 2252(b)(2) of Title 18 of the United States Code sets forth the statutory penalties for a

defendant convicted of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4). In general, a defendant who is convicted of a possession offense is subject to no minimum term of imprisonment and a statutory maximum term of ten years. 18 U.S.C. 2252(b)(2). If, however, the defendant has a prior conviction under, *inter alia*, "the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," then Section 2252(b)(2) imposes a mandatory minimum term of ten years of imprisonment and a maximum term of 20 years. *Ibid.* The issue in this case is whether the term "involving a minor or ward" modifies only "abusive sexual conduct," or whether it also modifies "aggravated sexual abuse" and "sexual abuse."

Recidivist enhancements with the same or similar language appear in the federal sentencing statutes for other child-pornography crimes. Section 2252(b)(1) is the sentencing provision for a variety of offenses related to the circulation of child pornography, referred to generally as receipt and distribution, in violation of 18 U.S.C. 2252(a)(1)-(3). Section 2251(e) is the sentencing provision for offenses involving the production of child pornography, in violation of 18 U.S.C. 2251(a)-(d). Section 2260(c) is the sentencing provision for foreign production, receipt, and distribution of child pornography for importation into the United States, in violation of 18 U.S.C. 2260(a)-(b). Finally, Section 2252A(b)(1) and (2) mirror the penalties in Section 2252(b)(1) and (2), respectively, for receipt, distribution, and possession offenses in violation of 18 U.S.C. 2252A(a), which covers materials meeting a statutory

definition of "child pornography." See 18 U.S.C. 2256(8).

2. For more than 30 years, "Congress has focused attention on the scope of child pornography offenses and the severity of penalties for child pornography offenders." U.S. Sentencing Comm'n, *The History of Child Pornography Guidelines* 6 (Oct. 2009) (*History of Child Pornography*).[1] Congress first regulated child pornography in 1978 by prohibiting the production of visual or print depictions of minors engaged in sexually explicit conduct and the commercial transportation, distribution, and receipt of child pornography that was obscene, punishable by up to ten years of imprisonment. Protection of Children Against Sexual Exploitation Act of 1977 (1977 Act), Pub. L. No. 95-225, § 2(a), 92 Stat. 7.[2] The 1977 Act was not widely used and resulted in few prosecutions. H.R. Rep. No. 536, 98th Cong., 1st Sess. 2 (1983).

Federal child-pornography laws expanded following this Court's decision in *New York* v. *Ferber*, 458 U.S. 747 (1982), which held that the First Amendment permits the States to prohibit the use of children in pornographic materials, even if the materials are not obscene. *Id.* at 756-758. After *Ferber*, Congress enacted the Child Protection Act of 1984 (1984 Act), Pub. L. No. 98-292, 98 Stat. 204, which prohibited the production and distribution of child pornography, regard-

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[1] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.

[2] The limited scope of the 1977 Act reflected First Amendment case law requiring a showing of obscenity as a condition precedent to regulation of pornography. See *Miller* v. *California*, 413 U.S. 15, 36-37 (1973).

less of whether it was obscene or had been produced for pecuniary purposes. § 4, 98 Stat. 204.

Congress further expanded the substantive criminal provisions related to child pornography after the Court's decision in *Osborne* v. *Ohio*, 495 U.S. 103 (1990), which held that States could outlaw private possession of child pornography that involved actual children. *Id.* at 111. After *Osborne*, Congress enacted the Child Protection Restoration and Penalties Enhancement Act of 1990 (1990 Act), Pub. L. No. 101-647, Tit. III, Subtit. B, 104 Stat. 4816, which banned, *inter alia*, possession of images of child pornography in the provision currently codified at 18 U.S.C. 2252(a)(4), punishable by a maximum term of five years of imprisonment. § 323(a), 104 Stat. 4818-4819.

3. From the outset, penalties for federal child-pornography crimes have included sentencing enhancements for defendants with prior convictions, and Congress has repeatedly expanded the list of convictions that trigger those recidivist enhancements.

a. The 1977 Act imposed a two-year mandatory minimum sentence for offenses related to the sale of obscene child pornography, and it increased the maximum sentence from ten to 15 years, if the offender had a prior conviction under "this section." § 2(a), 92 Stat. 8; 18 U.S.C. 2252(a) and (b) (1982). As the conduct prohibited by Section 2252(a) expanded to include the receipt and distribution of non-obscene child pornography in the 1984 Act, the reference to prior convictions under "this section" in the recidivist enhancement expanded accordingly. § 4, 98 Stat. 204. In the Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-591, Tit. VII, 100 Stat. 3341-74, Congress increased the mandatory minimum penalty for repeat

offenders from two to five years of imprisonment. § 704(b), 100 Stat. 3341-75.

In the Violent Crime Control and Law Enforcement Act of 1994 (1994 Act), Pub. L. No. 103-322, Tit. XVI, 108 Stat. 2036, Congress expanded the list of prior offenses that would trigger an enhanced penalty for receipt and distribution offenses under Section 2252(b)(1) from convictions under "this section" to any prior conviction under "this chapter or chapter 109A." § 160001(d), 108 Stat. 2037; see 18 U.S.C. 2252(b)(1) (1994). Offenses under "this chapter" referred to Chapter 110 of Title 18 of the United States Code, which is entitled "Sexual Exploitation and Other Abuse of Children" and includes the federal child-pornography crimes. See 18 U.S.C. 2251-2258 (1994). Chapter 109A prohibits federal "sexual abuse" offenses. See 18 U.S.C. 2241-2245 (1994).

b. Sentencing enhancements for prior state-law convictions were first added in the Child Pornography Prevention Act of 1996 (1996 Act), Pub. L. No. 104-208, § 121, 110 Stat. 3009-26. Congress expanded the list of prior convictions that would trigger the recidivist enhancement in Section 2252(b)(1) for receipt and distribution offenses—a list that had previously included only federal offenses under Chapters 110 and 109A—to include prior convictions "*under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward*, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." § 121(5), 110 Stat. 3009-30 (emphasis added). Congress also increased the statutory maximum for the Section 2252(b)(1) recidivist enhancement from 15 to 30 years of imprisonment. *Ibid.*

The 1996 Act also amended Section 2252(b)(2) to impose, for the first time, a recidivist enhancement for defendants convicted of possession offenses under Section 2252(a)(4). Congress imposed a two-year mandatory minimum sentence, and increased the maximum term of imprisonment from five to ten years, if a defendant convicted of possessing child pornography "ha[d] a prior conviction under [chapter 110] or chapter 109A, or under the laws of any State relating to the possession of child pornography." § 121(5), 110 Stat. 3009-30.

Two years later, Congress added offenses under Chapter 117 of Title 18 ("Transportation for Illegal Sexual Activity and Related Crimes") to the list of prior convictions that would trigger enhanced sentences for child-pornography offenses under Section 2252(b)(1) and (2). See Protection of Children From Sexual Predators Act of 1998 (1998 Act), Pub. L. No. 105-314, Tit. II, § 202(a)(1), 112 Stat. 2977. The 1998 Act also brought the list of state-law predicates that would trigger the recidivist enhancement for possession offenses under Section 2252(b)(2) into line with the state-law predicates triggering the enhancement for receipt and distribution offenses under Section 2252(b)(1). The list was expanded so that persons convicted of possession offenses who had prior state-law convictions relating to "*aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward*, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography" now also received enhanced sentences. § 202(a)(2), 112 Stat. 2977 (emphasis added); see 18 U.S.C. 2252(b)(2) (2000).

c. In 2003, Congress amended Section 2252(b)(1) and (2) by adding federal obscenity convictions under Chapter 71 of Title 18 and convictions under 10 U.S.C. 920, a provision of the Uniform Code of Military Justice relating to sexual assault, to the list of crimes that would trigger the recidivist enhancement under both provisions. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, Tit. V, § 507, 117 Stat. 683. Congress also increased the mandatory minimum sentence under Section 2252(b)(1) for recidivists convicted of receipt and distribution offenses from five to 15 years of imprisonment, and it increased the statutory maximum from 30 to 40 years. § 103(a)(1)(B)(ii) and (b)(1)(C)(iii), 117 Stat. 652-653. Congress also increased the mandatory minimum sentence under Section 2252(b)(2) for recidivists convicted of possession offenses from two to ten years of imprisonment, and it increased the statutory maximum from ten to 20 years. § 103(a)(1)(C)(ii) and (b)(1)(D), 117 Stat. 652-653.

In 2006, the qualifying prior offenses in Section 2252(b)(1) and (2) diverged again when Congress added prior convictions under 18 U.S.C. 1591 (prohibiting "Sex trafficking of children or by force, fraud, or coercion") and under state laws relating to the "sex trafficking of children" to the list of prior convictions that would trigger the recidivist enhancement for receipt and distribution offenses under Section 2252(b)(1), but not for possession offenses under Section 2252(b)(2). See Adam Walsh Child Protection and

Safety Act of 2006 (2006 Act), Pub. L. No. 109-248, Tit. II, § 206(b)(2), 120 Stat. 614.[3]

Section 2252(b)(2) currently requires a district court to sentence any person who is convicted of possessing child pornography under Section 2252(a)(4) to a minimum term of ten years of imprisonment, if that person:

> has a prior conviction under this chapter [*i.e.*, chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography.

18 U.S.C. 2252(b)(2).

B. Proceedings in Petitioner's Case

1. In November 2008, agents from United States Immigration and Customs Enforcement (ICE) learned that petitioner had recently wired $1000 to a

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[3] In the 1996 Act, Congress created 18 U.S.C. 2252A, which prohibits a variety of conduct including the receipt, distribution, and possession of materials meeting a statutory definition of child pornography. § 121(2)-(3), 110 Stat. 3009-28 to 3009-29. The sentencing provisions of Section 2252A(b)(1) (for receipt and distribution offenses) and 2252A(b)(2) (for possession offenses) mirrored the sentencing provisions of Section 2252(b)(1) and (2). See § 121(3), 110 Stat. 3009-29. Each time Congress amended Section 2252(b)(1) and (2), it made identical amendments to Section 2252A(b)(1) and (2), respectively. 1998 Act § 202(b)(1) and (2), 112 Stat. 2978; PROTECT Act §§ 103(a)(1)(D)(ii) and (E), 103(b)(1)(E)(iii) and (F), 507, 117 Stat. 652-653, 683; 2006 Act § 206(b)(3), 120 Stat. 614.

Russian money courier for a company that distributed child pornography. PSR ¶ 4. On June 2, 2010, ICE agents and United States postal inspectors sent petitioner a letter inviting him to visit a website where he could purchase child pornography. PSR ¶ 5. Petitioner responded, asking to buy six videos depicting children as young as nine years old engaging in sexually explicit conduct. PSR ¶¶ 6-17.

After obtaining a warrant to search petitioner's residence, agents conducted a controlled delivery of a package purporting to contain the videos that petitioner had ordered. J.A. 10. When petitioner accepted the package, the agents executed the search warrant. *Ibid.* On petitioner's laptop and external hard drive, the agents found more than 15,000 images and at least nine videos containing child pornography. *Ibid.*

2. A federal grand jury in the United States District Court for the Eastern District of New York returned an indictment charging petitioner with attempted receipt of child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1) (Count 1), and possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2) (Count 2). J.A. 10-11, 39-42. Petitioner pleaded guilty to Count 2 pursuant to a plea agreement that preserved his right to appeal if the district court imposed a ten-year mandatory minimum sentence under Section 2252(b)(2). J.A. 11, 14 n.2.

The PSR prepared by the Probation Office noted that petitioner had previously been convicted of first-degree sexual abuse under New York law after he pinned down and attempted to rape his adult girl-

friend. J.A. 11; PSR ¶¶ 47-48.[4] In light of that conviction, the PSR concluded that petitioner faced a ten-year mandatory minimum term of imprisonment pursuant to Section 2252(b)(2), and an increased statutory maximum of 20 years. PSR ¶ 87.

Petitioner argued that Section 2252(b)(2) did not apply in his case because his prior state-law conviction for first-degree sexual abuse did not involve a minor. J.A. 12, 45; 11-cr-00231 Docket entry No. 44, at 4 (Dec. 13, 2012) (sentencing memorandum). The district court overruled that objection. J.A. 45. The court explained that "the plain reading of the statute negates [petitioner's] * * * position" and that petitioner's prior conviction "fits within th[e] part of [Section 2252(b)(2)] that speaks of a state conviction for aggravated sexual abuse." *Ibid.* The court sentenced petitioner to ten years of imprisonment, to be followed by ten years of supervised release. J.A. 27-28, 50-51.

3. The court of appeals affirmed. J.A. 9-24. The court held that the phrase "involving a minor or ward" in Section 2252(b)(2) modifies only "abusive sexual conduct," and not "aggravated sexual abuse" or "sexual abuse." J.A. 10. Accordingly, the court held, "a sexual abuse conviction involving an adult victim constitutes a predicate offense" that triggers the ten-year

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[4] Petitioner stated that "after an argument, his girlfriend at the time accused him of rape" and that he pleaded guilty even though he did not rape her. PSR ¶ 48. Petitioner also had a previous New York conviction for third-degree assault with intent to cause physical injury after he struck a girlfriend in the face and body and choked her, causing substantial pain. PSR ¶¶ 45-46. In that case, too, petitioner claimed that the girlfriend had accused him of domestic assault after an argument and that he pleaded guilty even though he did not assault her. PSR ¶ 46.

mandatory minimum sentence provided in Section 2252(b)(2). *Ibid.*

a. The court of appeals stated that "the plain meaning [of Section 2252(b)(2)] is not pellucid," and the court therefore considered two competing canons of statutory interpretation: (i) the "last antecedent rule," under which "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows," J.A. 14-15 (quoting *United States* v. *Kerley*, 416 F.3d 176, 180 (2d Cir. 2005); and (ii) the "series qualifier" canon, which "provides that a modifier at the beginning or end of a series of terms modifies all the terms," J.A. 15 (quoting *United States* v. *Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012), cert. denied, 134 S. Ct. 235 (2013)).

The court of appeals explained that the last-antecedent rule, the rule advanced by the government, "generally applies absent a contrary indication of meaning." J.A. 15 (citing *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003)). The court further explained that applying the series-qualifier canon, as petitioner suggested, "would eliminate any distinction between 'sexual abuse involving a minor' and 'abusive sexual conduct involving a minor,'" since those two categories would "seemingly" cover the same conduct. J.A. 17. Petitioner's reading, the court explained, thus "run[s] up against the principle of statutory interpretation that '[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.'" *Ibid.* (brackets in original) (quoting *Bailey* v. *United States*, 516 U.S. 137, 146 (1995)).

The court of appeals nevertheless concluded that it could not "definitively determine by applying the

canons whether the phrase 'involving a minor or ward' modifies the entire category of state-law sexual abuse crimes or only 'abusive sexual conduct.'" J.A. 19. The court therefore turned to the remainder of Section 2252(b)(2) to determine "whether its overall scheme may shed light" on which state-law sexual-abuse offenses Congress intended to include as predicate offenses. *Ibid.*

b. The court of appeals noted that, immediately before the reference to state-law crimes, Section 2252(b)(2) imposes an identical ten-year mandatory minimum sentence on defendants who are convicted of possessing child pornography and have a prior federal conviction under "[chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice)." J.A. 19 (brackets in original) (citation omitted). The court explained that those provisions all "prohibit sexual conduct, including conduct that may have both minor and adult victims." *Ibid.* The court concluded that, "[l]ooking at [Section] 2252(b)(2) as a whole, * * * it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law." J.A. 20 (citation and internal quotation marks omitted).

The court of appeals further reasoned that petitioner's interpretation was undermined by comparing the language used to describe the predicate state sexual-abuse convictions with three of the federal predicate convictions included in Chapter 109A: 18 U.S.C. 2241 ("Aggravated sexual abuse"), 2242 ("Sexual abuse"), and 2243 ("Sexual abuse of a minor

or ward"). J.A. 23. The court explained that, under the federal statutes, "adult and minor victims are included under the first two provisions, while [Section] 2243 covers only minors and wards." *Ibid.* The court noted that, although the language used to describe predicate state-law convictions in Section 2252(b)(2) is not identical to the language used in those federal provisions, "it nonetheless suggests that Congress intended to impart a similar structure to state-law predicate offenses for purposes of this sentencing enhancement." *Ibid.*

c. The court of appeals acknowledged a statement in a Senate Report accompanying the 1996 Act indicating that penalties under Section 2252A(b)(1) would require a mandatory minimum sentence for "a repeat offender with a prior conviction under chapter 109A or 110 of title 18, *or under any State child abuse law* or law relating to the production, receipt or distribution of child pornography." J.A. 24 (emphasis added) (quoting S. Rep. No. 358, 104th Cong., 2d Sess. 9 (1996) (Senate Report)). The court stated that this "brief legislative history" did not "alter [its] conclusion." *Ibid.* The court added that resort to the rule of lenity was unwarranted because the statutory text allowed it "to make far more than a guess as to what Congress intended." *Ibid.* (citations and internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. The rule of the last antecedent provides that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003). Under a straightforward application of the last-antecedent rule, the modifier "involving a

minor or ward" should be read as applying only to the term that immediately precedes it—"abusive sexual conduct." 18 U.S.C. 2252(b)(2).

The statutory context confirms that reading of the statute. In addition to state-law predicates, Section 2252(b)(2) lists several federal convictions that will trigger the recidivist enhancement, many of which may have either minor or adult victims. And three of the federal predicates included in Section 2252(b)(2)—"[a]ggravated sexual abuse," "[s]exual abuse," and "[s]exual abuse of a minor or ward," 18 U.S.C. 2241-2243—correspond closely to the language Congress used to categorize state sexual-abuse offenses in Section 2252(b)(2). That context provides persuasive evidence that Congress intended for the term "involving a minor or ward" to modify only the last category of state sexual-abuse offenses. Indeed, the drafting history shows that when Congress added the relevant language to Section 2252(b)(1) in 1996, the state-law recidivist enhancement closely tracked the entire panoply of federal convictions that also triggered the same enhancement.

The interpretation indicated by the last-antecedent rule also promotes the purpose of the statute. Restricting the recidivist enhancement in Section 2252(b)(2) to only state sexual-abuse offenses involving minors or wards would eliminate as predicate offenses serious sexual-abuse crimes, and thereby contravene Congress's purpose to protect children by ensuring that child-pornography offenders who are convicted sexual predators serve longer prison terms. And under the categorical approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), petitioner's reading of the statute would also eliminate as predicate offenses

any conviction under a state law that did not require a minor or ward victim *as an element* of the offense.

II. The series-qualifier principle, on which petitioner relies, does not make sense in the context of Section 2252(b)(2). Petitioner admits that applying the series-qualifier principle would create two (of three) categories that are identical—"sexual abuse involving a minor or ward" and "abusive sexual conduct involving a minor or ward." That incongruity cannot reflect Congress's intention. And the language of a similar sentencing provision in 18 U.S.C. 2251(e) places the conjunction "or" in the list of state sexual-abuse offenses *after* "abusive sexual contact involving a minor or ward," reflecting that Congress did not view "involving a minor or ward" as a modifier appearing at the end of a list of slightly different, but overlapping terms.

Although the last-antecedent rule can be overcome by "other indicia of meaning," *Barnhart*, 540 U.S. at 26, petitioner has identified no persuasive evidence that Congress intended some other meaning. No anomaly appears when reading Section 2252(b)(2) according to the usual rule, and petitioner's attempts to find support for his interpretation in the drafting and legislative history of Section 2252(b)(2) and other statutes fall short. After considering the text, context, history, and purpose of Section 2252(b)(2), the meaning of the statute is clear, and there is no grievous ambiguity justifying the application of the rule of lenity.

ARGUMENT

I. SECTION 2252(b)(2) REQUIRES A MANDATORY MINIMUM SENTENCE OF TEN YEARS OF IMPRISONMENT IF A DEFENDANT CONVICTED OF POSSESING CHILD PORNOGRAPHY HAS A PRIOR STATE-LAW CONVICTION RELATING TO "AGGRAVATED SEXUAL ABUSE" OR "SEXUAL ABUSE," REGARDLESS OF WHETHER THE VICTIM IS A MINOR OR WARD

The question before the Court is whether the phrase "involving a minor or ward" in Section 2252(b)(2) modifies only the directly preceding term "abusive sexual conduct" or, alternatively, whether it also modifies the terms "aggravated sexual abuse" and "sexual abuse." 18 U.S.C. 2252(b)(2). The text, context, drafting history, and purpose of the statute all confirm that state-law offenses relating to "aggravated sexual abuse" and "sexual abuse" need not involve "a minor or ward" to trigger a mandatory minimum sentence under Section 2252(b)(2).[5]

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[5] In addition to the Second Circuit in this case, four other courts of appeals have concluded that the term "involving a minor or ward" in Section 2252(b)(2)—or in similar sentencing provisions contained in 18 U.S.C. 2252(b)(1), 2252A(b)(1) and (2)—modifies only "abusive sexual conduct." See *United States* v. *Mateen*, 764 F.3d 627, 633 (6th Cir. 2014) (en banc) (per curiam); *United States* v. *Spence*, 661 F.3d 194, 197-198 (4th Cir. 2011); *United States* v. *Hubbard*, 480 F.3d 341, 350 (5th Cir.), cert. denied, 552 U.S. 990 (2007); *United States* v. *Rezin*, 322 F.3d 443, 448 (7th Cir. 2003); see also *United States* v. *Sinerius*, 504 F.3d 737, 740, 744 (9th Cir. 2007) (concluding that prior conviction for sexual assault of a minor was an offense "relating to sexual abuse" and finding it unnecessary to determine whether the prior conviction was an offense relating to "abusive sexual conduct involving a minor" or "aggravated sexual abuse"), cert. denied, 552 U.S. 1211 (2008); *United States* v. *Becker*, 625 F.3d 1309, 1310-1311, 1312 n.3 (10th

A. Under The Rule Of The Last Antecedent, The Term "Involving A Minor Or Ward" In Section 2252(b)(2) Modifies Only "Abusive Sexual Conduct"

1. "[T]he language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.'" *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (quoting *United States* v. *Turkette*, 452 U.S. 576, 593 (1981)). The analysis of Section 2252(b)(2)'s text properly begins with the rule of the last antecedent, which provides that "a limiting clause or phrase * * * should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003); see *Jama* v. *ICE*, 543 U.S. 335, 343-344 (2005); *Federal Trade Comm'n* v. *Mandel Bros.*, 359 U.S. 385, 389-390 (1959).

Under the last-antecedent rule, "the series 'A or B with respect to C' contains two items: (1) 'A' and (2) 'B with respect to C.'" *Stepnowski* v. *Commissioner*, 456 F.3d 320, 324 n.7 (3d Cir. 2006). Unless the last-antecedent rule is "overcome by other indicia of meaning," it is "sensible as a matter of grammar" and should be applied. *Barnhart*, 540 U.S. at 26 (citation omitted); see William Strunk Jr. & E.B. White, *The Elements of Style* 28, 30 (4th ed. 2000) ("The position of the words in a sentence is the principal means of showing their relationship," and "[m]odifiers should come, if possible, next to the words they modify.").

Cir. 2010) (concluding that the issue remains open in that court notwithstanding *United States* v. *McCutchen*, 419 F.3d 1122 (2005)), cert. denied, 131 S. Ct. 2961 (2011); but see *United States* v. *Linngren*, 652 F.3d 868, 870 (8th Cir. 2011) (assuming that a prior state-law conviction for "sexual abuse" required "that the victim be a minor"), cert. denied, 132 S. Ct. 1594 (2012).

Applying the last-antecedent rule makes especially good sense where no comma separates the modifying phrase from the last antecedent. See generally *Osorio* v. *State Farm Bank, F.S.B.*, 746 F.3d 1242, 1257 (11th Cir. 2014); *Enron Creditors Recovery Corp.* v. *ALFA, S.A.B. DE C.V.*, 651 F.3d 329, 335-336 (2d Cir. 2011); *United States* v. *Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972); 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:33, at 494-503 (7th ed. 2014); 73 Am. Jur. 2d *Statutes* § 139, at 375 (2012).[6] The use of such a comma "indicate[s] that qualifying language is applicable to all of the preceding clauses," and its absence therefore signals the contrary conclusion. Robert J. Martineau & Michael B. Salerno, *Legal, Legislative, and Rule Drafting in Plain English* 68 (2005).[7]

2. Section 2252(b)(2) imposes a ten-year mandatory minimum sentence on a defendant convicted of possessing child pornography if the defendant has a prior conviction under any state law "relating to aggravated sexual abuse, sexual abuse, or abusive sexual

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[6] Although matters of punctuation are not dispositive, they remain "helpful" in determining congressional intent. J.A. 18 ("the lack of a separating comma * * * run[s] contrary to [petitioner's] interpretation" but "is not dispositive"); *Rezin*, 322 F.3d at 448 (noting that "[t]he punctuation [of Section 2252(b)(2)] is against [the defendant], though we do not regard that as determinative"); compare *United States* v. *Bass*, 404 U.S. 336, 340 n.6 (1971) (declining to "attach significance to an omitted comma"), with *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242-243 (1989) (relying on placement of commas in the statute).

[7] An example of such a construction appears in the Fifth Amendment to the U.S. Constitution: "nor [shall any person] be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

conduct involving a minor or ward." 18 U.S.C. 2252(b)(2). Under a straightforward application of the last-antecedent rule, the modifier "involving a minor or ward" should be read as applying only to the term that immediately precedes it—"abusive sexual conduct." Congress has given no textual clue, such as a comma before the modifier, indicating that the modifier applies to all three of the preceding terms. See *United States* v. *Mateen*, 764 F.3d 627, 631 (6th Cir. 2014) (en banc) (per curiam) (applying the last-antecedent rule to conclude that "involving a minor or ward" modifies only "abusive sexual conduct" in Section 2252(b)(2)). Accordingly, under the last-antecedent rule, the term "involving a minor or ward" does not modify prior state offenses relating to "aggravated sexual abuse" or "sexual abuse."

B. The Statutory Context Of Section 2252(b)(2) Confirms The Interpretation Indicated By The Last-Antecedent Rule

Construed in light of the last-antecedent rule, the language of Section 2252(b)(2) is clear. But if any ambiguity remains, the statutory context resolves it. *Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (citation omitted).

1. In addition to identifying prior state-law convictions that will trigger a ten-year mandatory minimum sentence, Section 2252(b)(2) also lists the following federal convictions that will trigger the recidivist enhancement: convictions "under this chapter [*i.e.*, chapter 110], chapter 71, chapter 109A, or chapter

117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)." 18 U.S.C. 2252(b)(2).

The only category of federal crimes that consists exclusively of offenses against children is Chapter 110, which covers "sexual exploitation and other abuse of children," including the child-pornography statute under which petitioner was convicted. See 18 U.S.C. 2251-2260A (2012 & Supp. 2013). The other three chapters of Title 18, however, and article 120 of the Uniform Code of Military Justice, include crimes that may have either minor or adult victims. Chapter 71 covers "obscenity" crimes. See 18 U.S.C. 1460-1470. Chapter 109A covers "sexual abuse" crimes. See 18 U.S.C. 2241-2248. Chapter 117 covers "transportation for illegal sexual activity and related crimes." 18 U.S.C. 2421-2428 (2012 & Supp. 2013). And article 120 of the Uniform Code of Military Justice covers "rape and sexual assault generally." 10 U.S.C. 920.

Section 2252(b)(2) does not specify that a conviction under any of those federal statutes must involve a minor or ward to trigger the provision's ten-year mandatory minimum sentence. J.A. 20. Every court of appeals to have considered the question has held that Congress's inclusion of federal crimes that may involve adult victims in Section 2252(b)(2)'s list of predicate offenses is persuasive evidence that "involving a minor or ward" does not modify all three categories of state sexual-abuse crimes included in the statute. See *ibid.*; *Mateen*, 764 F.3d at 631-632; *United States* v. *Spence*, 661 F.3d 194, 197 (4th Cir. 2011); *United States* v. *Hubbard*, 480 F.3d 341, 350 (5th Cir.), cert. denied, 552 U.S. 990 (2007); *United States* v. *Rezin*, 322 F.3d 443, 448 (7th Cir. 2003).

2. Additional evidence from the structure of the statute supports the conclusion that "involving a minor or ward" modifies only the category of offenses to which it is attached. Chapter 109A of Title 18—one of the chapters for which a prior conviction will trigger the Section 2252(b)(2) recidivist enhancement—contains three federal statutes that closely resemble the three categories of state sexual-abuse offenses at issue here. Section 2241 prohibits "[a]ggravated sexual abuse," Section 2242 prohibits "[s]exual abuse," and Section 2243 prohibits "[s]exual abuse of a minor or ward." Except for Section 2241(c) (singling out some sexual conduct with minors as "[a]ggravated sexual abuse" that warrants a minimum 30-year term of imprisonment), Sections 2241 and 2242 encompass crimes against both adult and minor victims, and Section 2243 covers only crimes against minors and wards.

The strong similarity between those three federal statutes and the three categories of state sexual-abuse crimes listed in Section 2252(b)(2)—"aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct involving a minor or ward"—is persuasive evidence that Congress intended to capture prior state-law convictions for "aggravated sexual abuse" and "sexual abuse" involving adult victims in Section 2252(b)(2).[8] "[I]t would have been strange had Con-

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[8] Although the parallel between the federal crimes of "aggravated sexual abuse," "sexual abuse," and "sexual abuse of a minor or ward" in 18 U.S.C. 2241-2243 sheds light on Congress's intent to include crimes involving adult victims in the first two categories of state sexual-abuse offenses, the state-law offenses covered by Section 2252(b)(2) are generic offenses that are not defined by the federal statutes. The terms used to describe the generic state-law

gress on the one hand authorized heavier punishment for offenders who had a prior *federal* conviction for a sexual crime whether or not it involved a minor, and on the other hand insisted that if the prior conviction had been for a state offense, even one identical to one of the enumerated federal offenses, the victim had to be a minor." *Rezin*, 322 F.3d at 448; accord J.A. 20; *Mateen*, 764 F.3d at 632 ("The parallel between these three federal offenses and the three listed categories of state offenses * * * is inescapable."). Applying the last-antecedent rule to the list of state sexual-abuse offenses in Section 2252(b)(2) avoids this anomalous result and ensures that a defendant with a prior conviction under state law for "aggravated sexual abuse" or "sexual abuse" involving an adult victim will receive the same enhanced statutory penalty as a defendant with a prior conviction under a federal statute prohibiting the sexual abuse of adult victims.

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offenses carry their ordinary, contemporary, and common meaning. See *United States* v. *Barker*, 723 F.3d 315, 319-320, 322-323 (2d Cir. 2013) (per curiam); *United States* v. *Gilbert*, 425 Fed. Appx. 212, 216 (4th Cir. 2011) (per curiam); *United States* v. *Sonnenberg*, 556 F.3d 667, 670-671 (8th Cir. 2009); *United States* v. *Morehouse*, 318 Fed. Appx. 87, 90 (3d Cir.) (per curiam), cert. denied, 558 U.S. 886 (2009); *Sinerius*, 504 F.3d at 740-742; *Hubbard*, 480 F.3d at 348-350; *United States* v. *Harding*, 172 Fed. Appx. 910, 913-914 (11th Cir.), cert. denied, 549 U.S. 847 (2006); see also *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993) ("Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'") (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)); but see *United States* v. *Osborne*, 551 F.3d 718, 720-721 (7th Cir. 2009) (concluding that "sexual behavior is 'abusive' [under Section 2252(b)(1)] only if it is similar to one of the crimes denominated as a form of 'abuse' elsewhere in Title 18").

C. The Drafting History Of Section 2252(b)(2) Supports The Conclusion That Congress Intended To Include Both Federal And State Sexual-Abuse Offenses Involving Adult Victims In The Recidivist Enhancement

The drafting history of Section 2252(b)(2) provides further proof of Congress's intent to limit "involving a minor or ward" to the last category listed in the phrase at issue here.

The language adding state-law predicates to the sentencing provisions for federal child-pornography crimes first appeared in Section 2252(b)(1)—the sentencing provision for offenses involving the receipt and distribution of child pornography. 1996 Act § 121(5), 110 Stat. 3009-30. At the time, Section 2252(b)(1) already included a recidivist enhancement for defendants with a prior conviction "under this chapter [*i.e.*, chapter 110] or chapter 109A." 18 U.S.C. 2252(b)(1) (1994). Chapter 110 contained the federal child-pornography laws, see 18 U.S.C. 2251-2258 (1994), including laws that prohibited the production (Section 2251), possession (Section 2252(a)(4)), receipt (Section 2252(a)(2)), mailing (Section 2252(a)(1)), sale (Section 2252(a)(3)), distribution (Section 2252(a)(2)), shipment (Section 2252(a)(1)), and transportation (Section 2252(a)(1)) of child pornography. And Chapter 109A contained federal sexual-abuse laws, see 18 U.S.C. 2241-2248 (1994), including "[a]ggravated sexual abuse" (Section 2241), "[s]exual abuse" (Section 2242), and "[s]exual abuse of a minor or ward" (Section 2243).

The 1996 Act added prior convictions under (i) state laws relating to "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography"; and (ii) state laws

relating to "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," to the list of predicate offenses under Section 2252(b)(1). § 121(5), 110 Stat. 3009-30.

The state offenses that Congress added to the list of Section 2252(b)(1) predicates in the 1996 Act reflect obvious parallels to the federal offenses that had made up that list for the previous two years—*i.e.*, offenses under Chapters 110 and 109A. J.A. 20; *Mateen*, 764 F.3d at 632; *Rezin*, 322 F.3d at 448; see 1994 Act § 160001(d), 108 Stat. 2037. That drafting history strongly indicates that Congress did not intend to limit state sexual-abuse offenses that would trigger the recidivist enhancement to only those involving statutes protecting minors or wards.

D. Applying The Last-Antecedent Rule Promotes The Purpose Of Section 2252(b)(2)

1. For more than 30 years, Congress has repeatedly acted to protect children and has "expressed its will regarding appropriate penalties for child pornography offenders" by broadening the substantive child-pornography crimes, by expanding the lists of predicate offenses that will trigger recidivist enhancements, and by repeatedly increasing the mandatory minimum and statutory maximum sentences applicable to such offenses. *History of Child Pornography* 6; see pp. 4-9, *supra*. Congress has not limited the predicate offenses that trigger recidivist enhancements solely to crimes against children, see pp. 20-23, *supra*, and Congress could reasonably presume that child-pornography offenders who have committed any of the prior offenses it listed in the recidivist enhancements—including those who have been convicted of sexually abusing adults—pose an enhanced risk of

committing further sex offenses against children (in addition to the child-pornography crimes they have already necessarily committed).

Restricting the recidivist enhancement in Section 2252(b)(2) to only state convictions under laws protecting minors or wards would eliminate as predicates serious sexual-abuse crimes, and thereby contravene Congress's purpose to protect children by ensuring that child-pornography offenders who are convicted sexual predators serve longer prison terms. The statute should not be interpreted to reach that result. See generally *Securities & Exch. Comm'n* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-351 (1943) (rules "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose").

2. Furthermore, restricting the recidivist enhancement to state sexual-abuse crimes "involving a minor or ward" could eliminate a huge number of serious sexual-abuse crimes *against minors* as predicate offenses.

a. Under the categorical approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), sentencing courts may look only to the statutory definition of a defendant's prior offense, and not to the particular facts of the underlying conviction, to determine whether a state conviction qualifies as a predicate offense under Section 2252(b)(2). See *id.* at 600. "[I]f the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as a[] * * * predicate, even if the defendant actually committed the offense in its generic form. The key * * * is elements, not facts." *Descamps* v. *United States*, 133 S. Ct. 2276, 2283 (2013).

In *Descamps*, the Court clarified that if a statute is overbroad but "divisible," *i.e.*, the statute comprises multiple, alternative versions of the crime, one or more of which would match or subsume the generic offense and one or more of which would not, then the sentencing court may apply a "modified categorical approach" and look to a limited set of materials to determine if the defendant had been convicted of a variant that matches the relevant generic offense. 133 S. Ct. at 2283-2284; see *Shepard* v. *United States*, 544 U.S. 13, 26 (2005). If the statute is "indivisible," however, *i.e.*, it does not contain alternative bases for conviction and criminalizes a broader swath of conduct than the relevant generic offense, the inquiry ends and the prior conviction cannot be used to trigger the enhancement. *Descamps*, 133 S. Ct. at 2285-2286.

b. Under petitioner's reading of the statute, to trigger Section 2252(b)(2)'s recidivist enhancement, a defendant must have a prior conviction for the generic offense of "aggravated sexual abuse involving a minor or ward," "sexual abuse involving a minor or ward," or "abusive sexual conduct involving a minor or ward." Under the modified categorical approach, only state sexual-abuse statutes (or variants of divisible statutes) that *require a minor or ward victim as an element* would trigger the recidivist enhancement under petitioner's reading.[9]

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[9] The most natural reading of the statutory language is that "involving a minor or ward" is an element of the generic crime of "abusive sexual conduct involving a minor or ward." See *United States* v. *Mateen*, 739 F.3d 300, 306-308 (6th Cir. 2014). If the Court reads the statute as petitioner suggests, however, so that "involving a minor or ward" modifies all three categories of state sexual-abuse offenses, that would raise the question whether

Take, for example, the current version of the New York statute under which petitioner was convicted. See Pet. Br. 5. New York Penal Law § 130.65 (McKinney Supp. 2015) provides:

> A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact:
>
> 1. By forcible compulsion; or
>
> 2. When the other person is incapable of consent by reason of being physically helpless; or
>
> 3. When the other person is less than eleven years old; or
>
> 4. When the other person is less than thirteen years old and the actor is twenty-one years old or older.

Ibid. Consider a defendant who forcibly rapes his 14-year old daughter and is convicted under this statute. Under the modified categorical approach, the conviction could not be used to justify a recidivist enhancement under Section 2252(b)(2).

The New York statute covers crimes against both adult and minor victims, so it criminalizes a broader swath of conduct than the elements of any generic offense that requires a minor victim as an element.

"involving a minor or ward" should instead be read as a circumstance-specific inquiry that must be proved beyond a reasonable doubt (but need not be a defining element of the offense), because otherwise petitioner's reading would "frustrate Congress' manifest purpose" by eliminating a huge number of serious sexual-abuse crimes against minors as predicate offenses. *United States* v. *Hayes*, 555 U.S. 415, 427 (2009); see *Nijhawan* v. *Holder*, 557 U.S. 29, 39-40 (2009).

The statute is divisible, but the hypothetical defendant was convicted under variant 1. Because variant 1 covers forcible sexual contact with both adult and minor victims, it does not categorically prohibit "aggravated sexual abuse involving a minor or ward," "sexual abuse involving a minor or ward," or "abusive sexual conduct involving a minor or ward."[10]

The modified categorical approach is "applicable only to divisible statutes." *Descamps*, 133 S. Ct. at 2284. Petitioner's reading of Section 2252(b)(2) would therefore eliminate as predicates any convictions under indivisible state statutes (or variants of divisible statutes) that prohibit sexual abuse in general against any person, *even if the victim is a minor or ward.*[11] That cannot be what Congress intended.

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[10] The defendant in *Mateen* provides another example. Before the Sixth Circuit granted rehearing en banc and interpreted Section 2252(b)(2) according to the last-antecedent rule, the court of appeals had concluded that the defendant, who was convicted of possessing child pornography and had a prior conviction under Ohio law for "gross sexual imposition" upon an eight-year-old girl, was not subject to the recidivist enhancement because he had pleaded guilty to a variant of the Ohio statute that did not "include[] the age of the victim as an element of the offense." *Mateen*, 739 F.3d at 306-308.

[11] Numerous state laws are indivisible statutes or variants of divisible statutes that prohibit sexual abuse in general against any person. See, *e.g.*, Ala. Code §§ 13A-6-61(a)(1) and (2), 13A-6-66 (LexisNexis 2005 & Supp. 2014); Alaska Stat. § 11.41.410(1) and (2) (2014); Ariz. Rev. Stat. Ann. §§ 13-1404, 13-1406 (2010); Ark. Code Ann. § 5-14-103(a)(1) and (2) (2013); Cal. Penal Code §§ 261, 266c (West 2014); Colo. Rev. Stat. §§ 18-3-402(1)(a)-(c) and (f)-(h), 18-3-404(1) (2014); Conn. Gen. Stat. Ann. § 53a-70(a)(1), (3), and (4) (West 2012); Del. Code Ann. tit. 11, §§ 769(a)(1), 773(a)(1)-(4) (Michie 2007); Ga. Code Ann. § 16-6-1(a) (2011); Haw. Rev. Stat. Ann. § 707-730(1)(a), (d), and (e) (LexisNexis Supp. 2014); Idaho

Code Ann. §§ 18-6101(3)-(9), 18-6108(3)-(7) (Michie Supp. 2015); 720 Ill. Comp. Stat. Ann. §§ 5/11-1.20(a)(1) and (2), 5/11-1.30(a) and (c) (West Supp. 2015); Ind. Code Ann. §§ 35-42-4-1, 35-42-4-8 (LexisNexis Supp. 2014); Iowa Code Ann. §§ 709.2, 709.11 (West 2003 & Supp. 2015); 2011 Kan. Sess. Laws 148, § 29(1)-(2) and (4)-(5); Ky. Rev. Stat. Ann. §§ 510.040(1)(a) and (b)(1), 510.070(1)(a) and (b)(1), 510.110(1)(a), (b)(1), and (3) (LexisNexis 2014); La. Rev. Stat. Ann. §§ 14:42.1, 14:43 (West 2007 & Supp. 2015); Me. Rev. Stat. Ann. tit. 17-A, § 253(1)(A) and (2)(A)-(D) (Supp. 2014); Md. Code Ann., Crim. Law §§ 3-303(a), 3-305(a) (LexisNexis 2012); Mass. Ann. Laws ch. 265, § 22 (LexisNexis 2010); Mich. Comp. Laws Ann. § 750.520b(1)(c)-(g) (West Supp. 2015); Minn. Stat. Ann. § 609.342 Subdiv. 1(c)-(f) (2009); Miss. Code Ann § 97-3-95(1)(a) and (b) (West 2011); Mo. Ann. Stat. §§ 566.030(1), 566.060(1), 566.100 (West Supp. 2015); Mont. Code Ann. §§ 45-5-502(1), 45-5-503(1) (2013); Neb. Rev. Stat. Ann. §§ 28-319(1)(a) and (b), 28-320 (LexisNexis 2009); Nev. Rev. Stat. Ann. § 200.366(1) (LexisNexis 2012); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(a)-(i), (m) and (n), 632-A:3(I) and (IV) (LexisNexis 2015); N.J. Stat. Ann. § 2C:14-2(a)(3)-(7), (c)(1), and (2) (West Supp. 2015); N.M. Stat. Ann. § 30-9-11(A), (C), (D)(2), (E)(2)-(6) and (F) (Supp. 2014); N.C. Gen. Stat. §§ 14-27.2(a)(2), 14-27.4(a)(2), 14-27.5, 14-27.5A (2013); N.D. Cent. Code §§ 12.1-20-03(1)(a)-(c), (e), (2)(b), and (c), 12.1-20-04, 12.1-20-07(1)(a)-(d) (2012); Ohio Rev. Code Ann §§ 2907.02(A)(1)(a), (c), and (2), 2907.03(A)(1)-(7) and (10)-(11), 2907.05(A)(1)-(3) and (5), 2907.06(A)(1)-(3) and (5) (LexisNexis 2014); Okla. Stat. Ann. tit. 21, § 1114(A)(2)-(6) (West 2015); Or. Rev. Stat. §§ 163.375(1)(a) and (d), 163.411(1)(a) and (c), 163.427(1)(a)(B) and (C) (2013); 18 Pa. Cons. Stat. Ann. §§ 3121(a), 3123(a), 3124.1, 3125(a)(1)-(6) (West 2000 & Supp. 2015); R.I. Gen. Laws §§ 11-37-2, 11-37-4 (2002 & Supp. 2014); S.C. Code Ann. §§ 16-3-652, 16-3-653, 16-3-654 (2003 & Supp. 2014); S.D. Codified Laws §§ 22-22-1(2)-(4), 22-22-7.2, 22-22-7.4 (2006 & Supp. 2015); Tenn. Code Ann. §§ 39-13-502, 39-13-503, 39-13-504(a)(1)-(3), 39-13-505 (2014); Tex. Penal Code Ann. §§ 22.011(a)(1), 22.021(a)(1)(A), (2)(A), and (C) (West 2011 & Supp. 2014); Utah Code Ann. §§ 76-5-402, 76-5-402.2, 76-5-404, 76-5-405 (LexisNexis 2012 & Supp. 2014); Vt. Stat. Ann. tit. 13, §§ 3252(a) and (b), 3253(a)(1)-(7) and (9) (2009); Va. Code Ann. § 18.2-61(A)(i) and (ii)

II. PETITIONER'S ALTERNATIVE CONSTRUCTION OF SECTION 2252(b)(2)'S RECIDIVIST ENHANCEMENT LACKS MERIT

Petitioner contends that the term "involving a minor or ward" in Section 2252(b)(2) modifies all three of the terms that precede it—"aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct." He contends (Br. 11-21) that the statute should be read according to the series-qualifier principle, an alternative canon of statutory construction that favors his preferred result. Petitioner contends that the drafting history (Br. 22-29, 33-34, 35-38) and the legislative history (Br. 29-33) of Section 2252(b)(2) or similar statutes provide the "other indicia of meaning," *Barnhart*, 540 U.S. at 26, necessary to overcome the last-antecedent rule by showing that Congress intended to limit all state sexual-abuse predicates to those involving minors or wards as victims. Finally, petitioner contends (Br. 39-43) that the Court should apply the rule of lenity. Each of petitioner's arguments should be rejected.

A. The Series-Qualifier Principle Does Not Apply

Petitioner contends (Br. 11-21) that the list of state sexual-abuse offenses in Section 2252(b)(2) should be read according to the series-qualifier principle. According to petitioner, that principle applies where: (1) the modifying clause is "applicable as much to the first and other words as to the last," and (2) the modifying clause appears at the end of a "single, integrated

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(2014); Wash. Rev. Code Ann. §§ 9A.44.040, 9A.44.050, 9A.44.060 (West 2015); W. Va. Code Ann. §§ 61-8B-3(a)(1), 61-8B-4 (LexisNexis 2014); Wis. Stat. Ann. § 940.225 (West Supp. 2014); Wyo. Stat. Ann. §§ 6-2-302, 6-2-303, 6-2-304 (2013).

list." Pet. Br. 12 (quoting *Porto Rico Ry., Light & Power Co.* v. *Mor*, 253 U.S. 345, 348 (1920) (*Porto Rico Railway*), and *Jama*, 543 U.S. at 344 n.4). Neither of those criteria is satisfied here.

1. Applying the modifier "involving a minor or ward" to all three categories of state sexual-abuse offenses does not make sense

Petitioner contends (Br. 13-14) that the Court should apply the series-qualifier principle because the modifier "involving a minor or ward" makes sense with all three categories of state sexual-abuse offenses listed in the statute. It is true that "aggravated sexual abuse involving a minor or ward" and "sexual abuse involving a minor or ward" are potential state-law crimes. But it would not be reasonable to conclude that Congress intended to limit "aggravated sexual abuse" or "sexual abuse" to crimes involving a minor or ward.

Under petitioner's construction of the statute, Section 2252(b)(2)'s recidivist enhancement would apply to state offenses involving (1) aggravated sexual abuse involving a minor or ward; (2) sexual abuse involving a minor or ward; and (3) abusive sexual conduct involving a minor or ward. Petitioner *concedes* that the second and third categories are identical. Pet. Br. 17 ("the ordinary meaning of 'abusive sexual conduct' is the same as the ordinary meaning of sexual abuse"); *ibid.* ("any fine distinction in meaning" between the categories "is eliminated by the broadening statutory phrase 'relating to'"); see J.A. 17 ("'abusive sexual conduct involving a minor' seemingly would encompass anything that constitutes 'sexual abuse involving a minor.'"). Petitioner makes no attempt to explain why Congress would have separately listed two identi-

cal categories of state sexual-abuse offenses in Section 2252(b)(2)'s recidivist enhancement, and his interpretation therefore runs up against the presumption against surplusage. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001).

Petitioner claims (Br. 34-35) that the rule against surplusage should not apply because the first category of state-law offenses, *i.e.*, "aggravated sexual abuse," is unnecessary under any interpretation of the statute. Although "aggravated sexual abuse" (and "abusive sexual conduct involving a minor or ward") are properly viewed as subsets of the generic offense of "sexual abuse," the inclusion of those terms serves the important purpose of clarifying that Congress wanted the recidivist enhancement to apply to those specialized and particularly serious types of "sexual abuse" offenses, as well as to statutes more generally prohibiting sexual abuse. See *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 137 (2007) ("[O]ur hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs. It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity.").

Furthermore, the inclusion of "abusive sexual conduct involving a minor or ward" as a separate category removes any doubt that Congress wanted to include offenses that, similar to 18 U.S.C. 2243, may involve consensual sexual conduct but are nevertheless illegal because of the nature of the victim. See, *e.g.*, *United States* v. *Rodriguez*, 711 F.3d 541, 559, 561 (5th Cir.) (en banc) (concluding that the generic definition of "statutory rape" for purposes of Sentencing Guide-

lines § 2L1.2 is "unlawful sexual intercourse with a person under the age of consent * * * regardless of whether it is against that person's will") (citation and brackets omitted), cert. denied, 134 S. Ct. 512 (2013). The redundancy created by petitioner's reading, on the other hand, is inexplicable.

Petitioner further suggests (Br. 35) that redundant language in statutes is not unusual and that Section 2252(b)(2) contains additional redundant language, such as the list of state child-pornography predicates—prior convictions relating to the "production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." See 18 U.S.C. 2252(b)(2). None of those terms, however, is purely synonymous with the others, unlike the redundancy created by petitioner's interpretation.

2. Section 2252(b)(2) does not contain an "integrated" list

a. Petitioner further contends (Br. 15-18) that the Court should read Section 2252(b)(2) in light of the series-qualifier principle because that canon is typically applied where the language in question is a "single, integrated list" of related terms, such as, "receives, possesses, or transports." *Id.* at 15 (quoting *Jama*, 543 U.S. at 344 n.4). Petitioner defines an "integrated" list as one requiring "slightly different, but overlapping[]" meanings. *Ibid.* The statutory language that precedes the modifier in Section 2252(b)(2) is not a list consisting of terms that have slightly different, overlapping meanings. As explained above, see pp. 32-34, *supra*, unless the modifier is applied only to the last category, the second and third categories—"sexual abuse" and "abusive sexual conduct"—are identical rather than "overlapping."

That feature distinguishes the language at issue from "receives, possesses, or transports," the "integrated list" on which petitioner principally relies. Pet. Br. 15 (citation omitted). The difference between a list containing distinct words that are similar or "overlapping" in meaning and one containing two phrases that bear the identical meaning is substantial. Take petitioner's example of a menu that lists a "cheeseburger, hamburger, or turkey burger with fries." *Id.* at 19. Petitioner notes that "[d]iners would expect fries to come with any of the three burgers, not just the last." *Ibid.* But if the list read "cheeseburger, hamburger, or hamburger with fries," the diner would not expect all burgers to come with fries. The statutory language preceding "involving a minor or ward" is not, under petitioner's own definition, an "integrated" list of separate but related terms.

Petitioner also suggests (Br. 18) that "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct" are an "interconnected whole" or "unit" composed of synonyms. Petitioner cites *United States* v. *Olano*, 507 U.S. 725, 731, 732 (1993), in which this Court concluded that the phrase "[p]lain errors or defects affecting substantial rights" did not create "two separate categories—'plain errors' and 'defects affecting substantial rights'"—because "the phrase 'error or defect' is more simply read as 'error.'" *Ibid.* (citation omitted) (citing *United States* v. *Young*, 470 U.S. 1, 15 n.12 (1985)). The Court's reasoning in *Olano* has no application here because the list that precedes "involving a minor or ward" includes "aggravated sexual abuse," which is not synonymous with either "sexual abuse" or "abusive sexual conduct."

b. Furthermore, the text of another child-pornography sentencing provision, 18 U.S.C. 2251(e), undermines petitioner's inference that Congress intended "involving a minor or ward" to modify all the categories preceding it. J.A. 16 n.3. Section 2251(e) is the sentencing provision for Section 2251, which is entitled "[s]exual exploitation of children" and prohibits the production of visual depictions of minors engaging in sexually explicit conduct. Between 1996 and 2006, the only state-law convictions included as predicates that would trigger the recidivist enhancement in Section 2251 were those under state laws "relating to the sexual exploitation of children." 1996 Act § 121(4), 110 Stat. 3009-30.

In the 2006 Act, Congress expanded the list of predicates in Section 2251(e) to include state laws relating to "*aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children*, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." § 206, 120 Stat. 614 (emphasis added). By placing the "or" in the italicized sublist *after* "abusive sexual contact involving a minor or ward," the modifier no longer appears at the end of a list of state sexual-abuse offenses, but in the middle of a longer sublist. J.A. 16 n.3.

Petitioner does not contend that Section 2251(e) can be read so that "aggravated sexual abuse" and "sexual abuse" are modified by the term "involving a minor or ward." Instead, he contends (Br. 38 n.10) that the term "involving a minor or ward" in Section 2251(e) *does not* modify "aggravated sexual abuse" and "sexual abuse," but that the views of the Congress acting in 2006 should not inform what an earlier Con-

gress meant when it used similar language in Section 2252(b)(2). The Court should reject the view that Congress intended such an incongruity between the similar sentencing provisions in Sections 2251(e) and 2252(b)(2).

Petitioner further notes (Br. 38 n.10) that Congress used different language in Section 2251(e) (it used the term "abusive sexual *contact*" instead of "abusive sexual *conduct*"), and he notes that when different language is used, one can assume that Congress meant something different. Whatever the reason for using the word "contact" instead of "conduct" in Section 2251(e), it does not explain why Congress placed the conjunction "or" *after* "abusive sexual contact involving a minor or ward," reflecting Congress's understanding that the term "involving a minor or ward" does not modify "aggravated sexual abuse" or "sexual abuse."

B. No "Other Indicia Of Meaning" Show That Congress Intended The Interpretation Suggested By The Series-Qualifier Principle

The grammatical presumption underlying the last-antecedent rule is, of course, "not an absolute" and can be overcome by "other indicia of meaning." *Barnhart*, 540 U.S. at 26. Petitioner has failed, however, to identify any persuasive evidence that Congress intended for the term "involving a minor or ward" to modify "aggravated sexual abuse" and "sexual abuse."

1. The rule of the last antecedent produces a more reasonable interpretation of Section 2252(b)(2) than does the series-qualifier principle

Petitioner states (Br. 19-20) that the Court should not engage in a "wooden application" of the last-

antecedent rule when it would require the Court to accept an unlikely premise. But petitioner never explains why the interpretation suggested by the last-antecedent rule is unlikely. The last-antecedent rule produces an interpretation of the statute that is based on the sensible premise that Congress intended state sexual-abuse predicates to cover conduct similar to their federal-law counterparts in Chapter 109A, an interpretation that promotes the purpose of the statute—to keep children safe by placing child-pornography offenders who are convicted sexual predators in prison for longer periods of time.

Petitioner cites a handful of decisions (Br. 13-14) where the Court has declined to apply the last-antecedent rule because it would require accepting an "unlikely premise[]," *United States* v. *Hayes*, 555 U.S. 415, 425-426 (2009), or because the series-qualifier principle suggested a "more reasonable" interpretation than the one produced by the usual rule, *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 330-332 (1993). In *Porto Rico Railway*, the Court construed a statute granting district courts jurisdiction over cases where all parties "are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Porto Rico." 253 U.S. at 346 (citation omitted). The Court concluded that the phrase "not domiciled in Porto Rico" modified not only "citizens of a State, Territory, or District of the United States" but also "citizens or subjects of a foreign State or States." *Id.* at 349. The Court explained that the statute "manifest[ed] a general purpose to greatly curtail the jurisdiction of the District Court" and that the alternative construction would be inconsistent with a treaty with Spain and

would cause "assuredly unintended discrimination." *Id.* at 348-349.

In *United States* v. *Bass*, 404 U.S. 336 (1971), the Court construed former 18 U.S.C. App. 1202(a), at 4474 (1970), a predecessor to 18 U.S.C. 922(g) that imposed criminal penalties on any person within specified categories who "receive[d], possesse[d], or transport[ed] in commerce or affecting commerce any firearm." 404 U.S. at 337 (citation omitted). The Court held that "in * * * or affecting commerce" modified possession (and not just transportation) because a federal prohibition on the possession of firearms without any link to interstate commerce would "effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* at 349.

And in *Paroline* v. *United States*, 134 S. Ct. 1710 (2014), the Court construed 18 U.S.C. 2259, which sets forth five specific categories of loss for which restitution is mandatory for victims of certain child exploitation offenses (*i.e.*, medical services; physical and occupational therapy; transportation, housing, and child care expenses; lost income; and attorneys' fees and costs), as well as "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(3)(A)-(F). The Court declined to apply the last-antecedent rule "in a mechanical way" and concluded instead that the statute requires proximate cause for all six categories of loss. *Paroline*, 134 S. Ct. at 1720; *id.* at 1731-1735 (Roberts, C.J., dissenting); *id.* at 1735-1736 (Sotomayor, J., dissenting). The Court relied on a canon of statutory construction relating to catchall clauses that does not apply here, and it further noted that "[r]eading the statute to

impose a general proximate-cause limitation accords with common sense"; that "[p]roximate cause is a standard aspect of causation in criminal law and the law of torts"; and that it "might well hold that a showing of proximate cause was required" even if the statute made no reference to it. *Id.* at 1720-1722.

Unlike in those cases, petitioner can point to nothing about the interpretation produced by the last-antecedent rule that is unlikely. Instead, it is his reading of the statute that would require the Court to accept the premise that Congress drafted state-law predicates that closely resemble federal crimes under Chapter 109A, but intended to limit those predicates to convictions under state sexual-abuse statutes that require the victim to be a minor or ward. The Court would also need to accept that, in doing so, Congress wrote a statute that lists three categories of state sexual-abuse offenses, two of which are the same.

2. The drafting history does not support petitioner's reading

Unable to show that his interpretation of Section 2252(b)(2) is more reasonable than the interpretation suggested by the usual rule, petitioner contends (Br. 22-27) that the drafting history of the federal child-pornography laws shows that Congress "deliberate[ly]" limited all state-law predicates in child-pornography recidivist enhancements to offenses involving minors. *Id.* at 22. Petitioner's view of the drafting history is misconceived.

a. i. The lists of predicate offenses that will trigger recidivist enhancements for federal child-pornography crimes were created over a period of years. In 1994, the list of predicate offenses that would trigger the enhancement for receipt and distri-

bution offenses under Section 2252(b)(1) included only federal crimes under Chapters 110 and 109A of Title 18. See 1994 Act, § 160001(d), 108 Stat. 2037. Because Chapter 110 covers the federal child-pornography crimes, see 18 U.S.C. 2251-2258 (1994), the state-law counterparts added to the list in the 1996 Act—state laws relating to "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography"—necessarily were limited to crimes against minors. See § 121(5), 110 Stat. 3009-30. Chapter 109A, in contrast, covers sexual-abuse crimes against both adults and children. 18 U.S.C. 2241-2245 (1994). As shown above (Part I.C, *supra*), when Congress added state-law counterparts to Section 2252(b)(1) in the 1996 Act, the language it selected corresponded closely with the full range of conduct prohibited by Chapters 110 and 109A. § 121(5), 110 Stat. 3009-30.[12]

ii. Petitioner notes (Br. 25-27) that, in the 1996 Act, Congress limited the state predicates that would trigger enhancements for other child-pornography crimes to crimes against children. For production offenses under Section 2251, Congress limited the state predicates to convictions under laws "relating to the sexual exploitation of children," § 121(4), 110 Stat. 3009-30;

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[12] Petitioner contends (Br. 37-38) that the state sexual-abuse crimes do not correspond with the federal offenses in Chapter 109A because Chapter 109A contains a fourth crime (Section 2244 ("Abusive sexual contact")) that is not listed among the state-law offenses in Section 2252(b)(2). The crimes described in Section 2244, however, fall comfortably within the ambit of offenses "relating to" the named crimes. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (the "ordinary meaning" of the words "relating to" is "a broad one—to stand in some relation.") (citation and internal quotation marked omitted).

and for possession offenses under Section 2252(b)(2), Congress limited the state predicates to convictions under laws "relating to the possession of child pornography," § 121(5), 110 Stat. 3009-30. Petitioner infers (Br. 26-27) from those provisions that, when Congress added prior state convictions "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" to the list of predicates for receipt and distribution offenses in Section 2252(b)(1), it intended for all such predicate offenses to involve minor victims. That is not what the drafting history shows.

For production and possession offenses, Congress initially decided not to include the whole panoply of state-law offenses corresponding to Chapters 110 and 109A. Instead, it included only prior convictions under the state-law analog to the *specific Chapter 110 offense of conviction*. See 18 U.S.C. 2251 ("Sexual exploitation of children"); 2252(a)(4) (possession of child pornography). Because Chapter 110 includes only crimes with minor victims, the subset of state-law analogs that Congress chose to include was necessarily limited to crimes against minors.

iii. Petitioner further contends (Br. 22-25) that Congress has at other times added federal crimes to the list of predicates in Section 2252(b)(2) or related provisions while limiting the state-law counterparts to crimes against children. Petitioner states (Br. 23-24) that Congress has included Chapter 71 "obscenity" offenses (which can involve obscene depictions of both adults and children) in Section 2252(b)(2), but it limited the corresponding state laws to those prohibiting only *child* pornography. That comparison is inapt. The federal counterpart to the state child-

pornography laws that petitioner describes is not Chapter 71 but Chapter 110, which prohibits the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of *child* pornography—the same conduct that the state-law counterpart describes. See 18 U.S.C. 2251, 2252(a). Congress has never added any state obscenity laws, involving depictions of either adults or children, to any child-pornography recidivist enhancement.

Petitioner further notes (Br. 24-25) that Congress has included federal sex-trafficking convictions under Chapter 117 and 18 U.S.C. 1591 (which can involve both adult and minor victims) in the list of predicate offenses for Section 2252(b)(1) and (2), but it has limited the corresponding state-law offenses in Section 2252(b)(1) to those relating to "sex trafficking of children." 18 U.S.C. 2252(b)(1). That aspect of the drafting history of Section 2252(b)(1) reflects only that when Congress adds state-law offenses to the lists of predicate offenses triggering child-pornography recidivist enhancements, it sometimes adds state offenses corresponding to only a subset of the federal offenses that it had previously included. See 1996 Act § 121(4)-(5), 110 Stat. 3009-30 (adding state offenses relating to the production of child pornography to Section 2251 and state offenses relating to the possession of child pornography to Section 2252(b)(2), but omitting state-law counterparts to any other Chapter 110 offense or any Chapter 109A offense).

Federal sex-trafficking crimes under Chapter 117 have been on the list of predicates in Section 2252(b)(1) and (2) since 1998. See 1998 Act § 202(a), 112 Stat. 2977. The addition—eight years later—of only a subset of the state-law counterparts to the

chapter 117 offenses to the list of predicates for receipt and distribution offenses under Section 2252(b)(1), see 2006 Act § 206(b)(2), 120 Stat. 614, sheds no light on what Congress intended when it added state sexual-abuse offenses corresponding to the federal crimes within Chapters 110 and 109A to the list of predicates in 1996.

b. i. Petitioner hypothesizes (Br. 27-29) that Congress may have intentionally limited state sexual-abuse offenses to those involving minors because it feared that state "sexual abuse" statutes might include comparatively minor misdemeanor offenses such as "public lewdness" or "indecent exposure" that would not be serious enough to warrant the recidivist enhancement, or because it wanted to save courts from the trouble of deciding whether new types of sex crimes involving cyberstalking or "revenge porn" were state laws "relating to" sexual abuse of adults.

Congress, however, could not have feared that individual States might adopt excessively broad definitions of "sexual abuse," because the meaning of the generic offenses of "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct involving a minor or ward" do not turn on the particulars of state or federal law, but rather reflect the ordinary, contemporary, and common understanding of those terms. See note 8, *supra*. Nor does petitioner demonstrate that "sexual abuse," as commonly understood, includes public lewdness or indecent exposure directed at an adult.[13] In any event, it is not plausible that Congress

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[13] *United States* v. *Padilla-Reyes*, 247 F.3d 1158 (11th Cir.), cert. denied, 534 U.S. 913 (2001), the sole case on which petitioner relies (Br. 28), suggests only that "sexual abuse of a minor" need not require "physical contact." 247 F.3d at 1163 (citation omitted).

would have addressed such a concern by entirely eliminating all state-law predicates involving adults, including serious offenses such as aggravated sexual assault. Instead, any such concern could easily have been resolved by excepting from Section 2252(b)(2) misdemeanor offenses against adult victims that lacked physical contact.

ii. Petitioner's hypothesis (Br. 27-28) that Congress limited state-law offenses to those involving minors or wards because it was unfamiliar with the scope of state sexual-abuse laws and wanted to ensure that recidivists receiving the enhancement were "sufficiently culpable and dangerous" because they had previously abused *children* fails to account for Congress's indisputable inclusion of state sexual-abuse offenses involving *wards* as predicates that would trigger the recidivist enhancement. 18 U.S.C. 2252(b)(2).

The term "ward" is not, as petitioner suggests (Br. 27) limited to people who are deemed "incapable of consenting to sex by virtue of their status." The common definition of a ward is someone who is "under guard or in guardianship," *Webster's Third New International Dictionary* 2575 (1993), which can include not only minors and others who are placed under a guardian's care, but also prisoners. Indeed, the federal statute prohibiting "sexual abuse of a minor or ward," defines a ward as a person who is in "official detention" in a U.S. jurisdiction or federal prison and "under the custodial, supervisory, or disciplinary

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Because *Padilla-Reyes* relies on the psychological trauma experienced by children who have been used as the object of adult sexual gratification, *id.* at 1163-1164, it does not support the claim that indecent exposure to an adult victim constitutes "sexual abuse."

authority of the person" who has engaged in a sexual act with the detainee. 18 U.S.C. 2243(b)(1)-(2). State statutes prohibit similar conduct.[14] Petitioner does not explain why Congress would want to include state sexual-abuse convictions involving adults only if the victim is a ward, but not serious sexual-abuse crimes perpetrated against other adult victims.

3. The legislative history does not overcome the last-antecedent rule

Petitioner further contends (Br. 29-33) that statements in the legislative history indicate that Congress

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[14] Alaska Stat. §§ 11.41.425(a)(2) and (4)-(6), 11.41.427(a)(1) and (3)-(5) (2014); Ariz. Rev. Stat. Ann. §§ 13-1409(A), 13-1419 (Supp. 2014); Ark. Code Ann. §§ 5-14-110(a)(3)(A) and (4)(A), 5-14-124(a)(1)(A), 5-14-125(a)(4)(A)(i), 5-14-126(a)(1)(A) and (B), 5-14-127(a)(2) (2013); Colo. Rev. Stat. §§ 18-3-402(f), 18-3-404(f) (2014); Conn. Gen. Stat. Ann § 53a-71(a)(5) (West Supp. 2015); Haw. Rev. Stat. Ann. §§ 707-731(1)(c), 707-732(e) (LexisNexis Supp. 2014); Idaho Code Ann. § 18-6110 (Michie Supp. 2015); Ky. Rev. Stat. Ann. §§ 510.060(1)(e), 510.090(1)(e), 510.120(1)(c) (LexisNexis 2014); Me. Rev. Stat. Ann. tit. 17-A, § 253(2)(E) (Supp. 2014); Md. Code Ann., Crim. Law § 3-314(b) (LexisNexis 2012); Mich. Comp. Laws Ann. § 750.520c(1)(i)-(*l*) (West Supp. 2015); Minn. Stat. Ann. §§ 609.344 Subdiv. 1(m), 609.345 Subdiv. 1(m) (West Supp. 2015); Neb. Rev. Stat. Ann. §§ 28-322.01, 28-322.02, 28.322.03 (LexisNexis 2009); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(n), 632-A:3(IV), 632-A:4(III) (LexisNexis 2015); N.J. Stat. Ann. § 2C:14-2(c)(2) (West Supp. 2015); N.M. Stat. Ann. § 30-9-11(E)(2) (Supp. 2014); N.C. Gen. Stat. § 14-27.7(a) (2013); N.D. Cent. Code §§ 12.1-20-06, 12.1-20-07(1)(d) (2012); Ohio Rev. Code Ann. § 2907.03(A)(6) and (11) (LexisNexis 2014); Okla. Stat. Ann. tit. 21, § 888(B)(4) (West 2015); 18 Pa. Cons. Stat. Ann. § 3124.2(a) and (a.1) (West Supp. 2015); Tex. Penal Code Ann § 22.011(b)(11) (West 2011); Vt. Stat. Ann. tit. 13, § 3257 (2009); Va. Code Ann. § 18.2-64.2 (2014); Wis. Stat. Ann. § 940.225(2)(h) and (i) (West Supp. 2014); Wyo. Stat. Ann. § 6-2-303(a)(vii) (2013).

understood the state sexual-abuse predicates in Section 2252(b)(2) to relate only to crimes against children. Because the meaning of Section 2252(b)(2) is clear, "there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997); accord *Boyle* v. *United States*, 556 U.S. 938, 950 (2009). In any event, the scant history of the recidivist enhancement for state sexual-abuse offenses provides no basis for concluding that "aggravated sexual abuse" and "sexual abuse" offenses must arise under state sexual abuse laws that require a minor or ward victim.

As noted above, see pp. 6-7, *supra*, Congress first added the relevant statutory language to Sections 2252(b)(1) and 2252A(b)(1) in the 1996 Act. A related Senate Report described Section 2252A(b)(1) as follows: "[A] repeat offender with a prior conviction under chapter 109A or 110 of title 18, or under *any State child abuse law* or law relating to the production, receipt or distribution of child pornography would be fined and imprisoned for not less than 5 years nor more than 30 years." Senate Report 9 (emphasis added). Furthermore, the legislative history of the 1998 Act includes a letter (Pet. Br. 31-33) to Congress from the Department of Justice encouraging Congress to bring the state-law predicates for possession offenses under Section 2252(b)(2) into line with the more expansive list of state-law predicates that would trigger the recidivist enhancement for receipt and distribution offenses under Section 2252(b)(1). The letter noted that, under the 1996 Act, "there [wa]s no enhanced provision for those individuals charged with possession of child pornography who have *prior convictions for child abuse*," and it suggested "an

increased mandatory minimum sentence of [two] years for individuals charged with a violation of any subsection of 2252 or 2252A, if the individual had a prior conviction for sexual abuse *of a minor*." H.R. Rep. No. 557, 105th Cong., 2d Sess. 31 (1998) (emphasis added).

Those statements in the legislative history are imprecise. They are both overinclusive (because the recidivist enhancement covers only a small subset of "[s]tate child abuse" convictions, *i.e.*, those involving *sexual* abuse) and underinclusive (because the statements do not account for the full scope of state-law offenses covered by the language of the enhancement, including sexual abuse of wards). Because those statements misdescribe the statutory language, they provide no persuasive evidence of its meaning or scope. "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)).

Even if those statements had referred to "any State child sexual abuse law," the statements would not demonstrate that only such convictions can trigger Section 2252(b)(2)'s recidivist enhancement. Instead, the statements would reflect the undisputed fact that child sexual-abuse offenses are included among the state sexual-abuse convictions that will trigger an enhanced statutory sentencing range. The statements are best understood as attempts to condense and simplify the categories of state crimes being added to the recidivist enhancement. Indeed, the Senate Report describes the state child-pornography offenses being added to the list as "law[s] relating to the pro-

duction, receipt or distribution of child pornography," Senate Report 9, a shorthand (but incomplete) way of describing the full range of state child-pornography crimes that Congress had added, *i.e.*, laws relating to the "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography," 1996 Act § 121(5), 110 Stat. 3009-30.

C. The Rule Of Lenity Does Not Apply

Finally, petitioner (Br. 39-43) invokes the rule of lenity to support his narrow construction of Section 2252(b)(2)'s recidivist enhancement. The rule of lenity is a tie-breaking rule of statutory construction that applies only "at the end of the process of construing what Congress has expressed." *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013) (citation omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule," *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998). Instead, as this Court has repeatedly emphasized, "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich*, 133 S. Ct. at 2209.

This case provides "no work for the rule of lenity to do." *Maracich*, 133 S. Ct. at 2209. Interpreted using the ordinary tools of statutory construction, Section 2252(b)(2)'s recidivist enhancement for state sexual-abuse offenses is clear. The limiting phrase "involving a minor or ward" modifies only its last antecedent, *i.e.*, "abusive sexual conduct." That interpretation accounts for the parallel enhancement for federal

sexual-abuse offenses involving adults, avoids giving two (out of three) categories the identical scope, and advances (rather than thwarts) the statutory purposes. For all of those reasons, the statutory language is not ambiguous—and certainly not "grievous[ly]" so. *Ibid.*; see J.A. 24 (rejecting the rule of lenity because the statutory text allowed the court of appeals "to make far more than a guess as to what Congress intended") (citations and internal quotation marks omitted). The rule of lenity should not be applied.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. 18 U.S.C. 2241 provides:

Aggravated sexual abuse

(a) BY FORCE OR THREAT.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act—

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) BY OTHER MEANS.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) WITH CHILDREN.—Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State

offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) STATE OF MIND PROOF REQUIREMENT.—In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

2. 18 U.S.C. 2242 provides:

Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is—

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

3. 18 U.S.C. 2243 provides:

Sexual abuse of a minor or ward

(a) OF A MINOR.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) OF A WARD.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of

any Federal department or agency, knowingly engages in a sexual act with another person who is—

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(c) DEFENSES.—(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) STATE OF MIND PROOF REQUIREMENT.—In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew—

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

4. 18 U.S.C. 2244 provides:

Abusive sexual contact

(a) SEXUAL CONDUCT IN CIRCUMSTANCES WHERE SEXUAL ACTS ARE PUNISHED BY THIS CHAPTER.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate—

(1) subsection (a) or (b) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both;

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(5) subsection (c) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title and imprisoned for any term of years or for life.

(b) IN OTHER CIRCUMSTANCES.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.

(c) OFFENSES INVOLVING YOUNG CHILDREN.—If the sexual contact that violates this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

5. 18 U.S.C. 2246 provides:

Definitions for chapter

As used in this chapter—

(1) the term "prison" means a correctional, detention, or penal facility;

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term "official detention" means—

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency; and

(6) the term "State" means a State of the United States, the District of Columbia, and any commonwealth, possession, or territory of the United States.

6. 18 U.S.C. 2251 provides:

Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for

the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign

commerce by any means including by computer or mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

7. 18 U.S.C. 2252 provides:

Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or un-

der the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform

Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant—

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

8. 18 U.S.C. 2252A provides:

Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or

affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other materi-

al that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or any means or facility of interstate or foreign commerce,

for purposes of inducing or persuading a minor to participate in any activity that is illegal; or

(7) knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor.[1]

shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense

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[1] So in original. The period probably should be a comma.

involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(3) Whoever violates, or attempts or conspires to violate, subsection (a)(7) shall be fined under this title or imprisoned not more than 15 years, or both.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) ADMISSIBILITY OF EVIDENCE.—On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) CIVIL REMEDIES.—

(1) IN GENERAL.—Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

(2) RELIEF.—In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

(g) CHILD EXPLOITATION ENTERPRISES.—

(1) Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.

(2) A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

9. 18 U.S.C. 2260 provides:

Production of sexually explicit depictions of a minor for importation into the United States

(a) USE OF MINOR.—A person who, outside the United States, employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who

transports any minor with the intent that the minor engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, intending that the visual depiction will be imported or transmitted into the United States or into waters within 12 miles of the coast of the United States, shall be punished as provided in subsection (c).

(b) USE OF VISUAL DEPICTION.—A person who, outside the United States, knowingly receives, transports, ships, distributes, sells, or possesses with intent to transport, ship, sell, or distribute any visual depiction of a minor engaging in sexually explicit conduct (if the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct), intending that the visual depiction will be imported into the United States or into waters within a distance of 12 miles of the coast of the United States, shall be punished as provided in subsection (c).

(c) PENALTIES.—

(1) A person who violates subsection (a), or attempts or conspires to do so, shall be subject to the penalties provided in subsection (e) of section 2251 for a violation of that section, including the penalties provided for such a violation by a person with a prior conviction or convictions as described in that subsection.

(2) A person who violates subsection (b), or attempts or conspires to do so, shall be subject to the

penalties provided in subsection (b)(1) of section 2252 for a violation of paragraph (1), (2), or (3) of subsection (a) of that section, including the penalties provided for such a violation by a person with a prior conviction or convictions as described in subsection (b)(1) of section 2252.

APPENDIX B

CHAPTER 71—OBSCENITY

Sec.

1460. Possession with intent to sell, and sale, of obscene matter on Federal property.

1461. Mailing obscene or crime-inciting matter.

1462. Importation or transportation of obscene matters.

1463. Mailing indecent matter on wrappers or envelopes.

1464. Broadcasting obscene language.

1465. Transportation of obscene matters for sale or distribution.[1]

1466. Engaging in the business of selling or transferring obscene matter.

1466A. Obscene visual representation of the sexual abuse of children.

1467. Criminal forfeiture.

1468. Distributing obscene material by cable or subscription television.

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[1] Section catchline amended by Pub. L. 109-248 without corresponding amendment of chapter analysis.

1469. Presumptions.

1470. Transfer of obscene material to minors.

CHAPTER 109A—SEXUAL ABUSE

Sec.

2241. Aggravated sexual abuse.

2242. Sexual abuse.

2243. Sexual abuse of a minor or ward.

2244. Abusive sexual contact.

2245. Sexual abuse resulting in death.[1]

2246. Definitions for chapter.

2247. Repeat offenders.

2248. Mandatory restitution.

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[1] Section catchline amended by Pub. L. 109-248 without corresponding amendment of chapter analysis.

CHAPTER 110—SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

Sec.

2251. Sexual exploitation of children.

2251A. Selling or buying of children.

2252. Certain activities relating to material involving the sexual exploitation of minors.

2252A. Certain activities relating to material constituting or containing child pornography.

2252B. Misleading domain names on the Internet.

2252C. Misleading words or digital images on the internet.

2253. Criminal forfeiture.

2254. Civil forfeiture.

2255. Civil remedy for personal injuries.

2256. Definitions for chapter.

2257. Record keeping requirements.

2257A. Recordkeeping requirements for simulated sexual conduct.[1]

2258. Failure to report child abuse.

2258A. Reporting requirements of electronic communication service providers and remote

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[1] So in original. Does not conform to section catchline.

computing service providers.

2258B. Limited liability for electronic communication service providers and remote computing service providers.[1]

2258C. Use to combat child pornography of technical elements relating to images reported to the CyberTipline.

2258D. Limited liability for the National Center for Missing and Exploited Children.

2258E. Definitions.

2259. Mandatory restitution.

2260. Production of sexually explicit depictions of a minor for importation into the United States.

2260A. Increased penalties for registered sex offenders.[1]

CHAPTER 117—TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES

Sec.

2421. Transportation generally.

2422. Coercion and enticement.

2423. Transportation of minors.

2424. Filing factual statement about alien individual.

2425. Use of interstate facilities to transmit information about a minor.

2426. Repeat offenders.

2427. Inclusion of offenses relating to child pornography in definition of sexual activity for which any person can be charged with a criminal offense.

2428. Forfeitures.